

A Vithal Kumar a/l Jayaraman v Azman bin Md Nor

B COURT OF APPEAL (PUTRAJAYA) — APPEAL NO B-03–2 OF 2008
LOW HOP BING, KN SEGARA AND RAMLY ALI JJCA
30 SEPTEMBER 2009

C *Civil Procedure — Judgments and orders — Judgment upon admission of fact —*
Claim for repayment of loan based on loan agreements — Whether there was
unequivocal admission of fact by defendant — Whether there were issues to be
tried — Whether there was defence to action — Whether admission may be made
D *by letters, other documents or agreements — Whether admissions confined to*
admissions contained in pleadings alone — Whether court could consider
admissions made before commencement of legal proceedings — Rules of the High
Court 1980 O 27 r 3

E The plaintiff/respondent claimed against the first defendant/appellant for
breach of friendly loans claimed to have been given to the first defendant over
a period of time pursuant to several written and oral agreements between
them. The plaintiff applied to enter judgment under O 27 r 3 of the Rules
of the High Court 1980 ('RHC') against the first defendant. The senior
F assistant registrar allowed the plaintiff's application and the first defendant's
subsequent appeal to the judge in chambers was dismissed. Hence the present
appeal. The first defendant denied borrowing any money from the plaintiff
contending that the monies were for the plaintiff's investment in the first
defendant's company. The first defendant claimed that the various loan
G agreements executed by him and the plaintiff were mere façade and that the
plaintiff's attempt to enforce those loan agreements by filing the suit was
done in bad faith. The first defendant submitted that the defence as pleaded
did not contain any admission as alleged by the plaintiff.

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Held, dismissing the appeal with costs:

(1) The object of O 27 r 3 of the RHC is to enable a party to obtain speedy
judgment where the other party has made a plain admission entitling
the former to succeed in his claim. This rule relates to admissions of
I fact, whether in the pleadings or otherwise. The admission must be a
clear admission, and not simple evidence of some facts upon which the
plaintiff would have to rely to establish his cause of action (see paras
12–13).

- (2) The words 'or otherwise' in the said rule are of general application and justify the making of an order or judgment where an admission is made by letter or other relevant documents or agreements which clearly show that the defendant has no defence to the plaintiff's claim. They are not confined to admissions contained in pleadings alone. The court can consider and decide on the admissions made before any legal proceedings have been commenced (see paras 15 & 21). A B
- (3) The relevant documents showed that the monies were loans or borrowings given by the plaintiff to the first defendant pursuant to loan agreements with clear undertaking from the first defendant to repay the amount taken within the stipulated time. The admission related to issue of fact ie that the first defendant borrowed the amount in question from the plaintiff and thereafter failed to repay as promised by him. The first defendant failed to substantiate his claim to defeat the clear admission as contained in all the relevant documents. With the admissions, the first defendant had no defence to the action and the plaintiff was able to obtain judgment under O 27 r 3 of the RHC (see paras 28 & 30). C D

[Bahasa Malaysia summary]

Plaintif/ responden menuntut terhadap defendan/perayu bagi suatu kemungkiran pinjaman tidak formal yang dikatakan telah diberi kepada defendan pertama dalam satu tempoh masa berikutan beberapa perjanjian bertulis dan lisan antara mereka. Plaintiff memohon untuk memasukkan penghakiman di bawah A 27 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap defendan pertama. Penolong kanan pendaftar membenarkan permohonan plaintiff dan rayuan defendan pertama di hadapan hakim dalam kamar kemudiannya ditolak. Justeru rayuan ini. Defendan pertama menafi meminjam wang daripada plaintiff berhujah bahawa wang tersebut adalah untuk pelaburan plaintiff dalam syarikat defendan pertama. Defendan pertama mendakwa bahawa beberapa perjanjian pinjaman yang disempurnakan olehnya dan plaintiff hanyalah merupakan kepura-puraan dan percubaan plaintiff untuk melaksanakan perjanjian-perjanjian pinjaman tersebut dengan memfailkan tindakan tersebut dilakukan dengan niat jahat. Defendan pertama menghujah bahawa pembelaan yang dihidkan tidak mengandungi pengakuan seperti yang didakwa oleh plaintiff. E F G H

Diputuskan, menolak rayuan dengan kos: I

- (1) Objektif A 27 k 3 KMT adalah bagi membolehkan suatu pihak mendapatkan penghakiman pantas apabila satu pihak lagi telah membuat pengakuan yang memberi hak kepada pihak yang satu lagi

- A untuk berjaya dalam tuntutan. Peraturan ini berkaitan dengan pengakuan fakta, sama ada diakui dalam pliding atau tidak. Pengakuan tersebut hendaklah jelas dan bukannya keterangan yang ringkas atas suatu fakta yang mana plaintif harus bergantung kepadanya untuk membuktikan kausa tindakannya (lihat perenggan 12–13).
- B (2) Perkataan ‘or otherwise’ dalam kaedah tersebut merupakan aplikasi umum dan mewajarkan suatu perintah atau penghakiman di mana suatu pengakuan dibuat menerusi surat atau dokumen lain yang relevan yang jelas menunjukkan bahawa defendan tiada pembelaan ke atas tuntutan plaintif. Pengakuan tersebut tidak terbatas dalam pliding sahaja. Mahkamah boleh mempertimbang dan memutuskan atas pengakuan yang telah dibuat sebelum mana-mana prosiding perundangan dibuat (lihat perenggan 15 & 21).
- C (3) Dokumen-dokumen yang relevan menunjukkan bahawa wang tersebut adalah pinjaman atau hutang yang diberikan oleh plaintif kepada defendan pertama berikutan dengan perjanjian-perjanjian pinjaman dengan akujanji jelas daripada defendan pertama untuk membayar jumlah yang telah diambil tersebut dalam jangka masa yang telah ditetapkan. Pengakuan berkaitan dengan isu fakta iaitu bahawa defendan pertama meminjam sejumlah wang yang dipertikaikan daripada plaintif dan kemudiannya gagal membayar seperti yang telah dijanjikan. Defendan pertama gagal mengesahkan dakwaannya bagi mematahkan pengakuan jelas tersebut seperti yang terkandung dalam kesemua dokumen yang relevan tersebut. Dengan pengakuan tersebut, defendan pertama tiada pembelaan bagi tindakan ini dan plaintif berjaya memperoleh penghakiman di bawah A 27 k 3 KMT (lihat perenggan 28 & 30).]
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Notes

- G For cases on judgment upon admission of facts, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4168–4169.

Cases referred to

- H *Carabao Exports Pty Ltd v Online Management Consultants Sdn Bhd & Ors* [1988] 3 MLJ 271, HC (refd)
Ellis v Allen [1914] 1 Ch 904, Ch D (refd)
Folin & Bros Sdn Bhd (in receivership) v Wong Foh Ling & Ors [1991] 2 CLJ (Rep) 609, HC (refd)
Low Yoke Lan v Ng Ooi Kiat [2001] 4 AMR 4781, HC (refd)
- I *Malacca Precast Concrete Works v William Jacks & Co (M) Sdn Bhd* [1970] 2 MLJ 111, FC (refd)
Pembinaan KSY Sdn Bhd v Syarikat Federal Furniture Construction and Engineering Works [1991] 1 MLJ 347, SC (refd)
Tom Manas Enterprise Sdn Bhd v Soh Ah Wah [1995] 3 CLJ 610, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 27 r 3

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Appeal from: Suit No MT1–22–161 of 2005 (High Court, Shah Alam)

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Prakash Lachimanan (Mathews Hun Kandiah) for the appellant.

Nachamnai Kumarappan (Noor Nilam & Associates) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

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[1] The plaintiff's claim against the first defendant is premised on a breach of friendly loans for a sum of RM468,500 claimed to have been given to the first defendant over a period between July 2000 and February 2002 pursuant to several written agreements dated 30 June 2000, 5 December 2000 and 2 February 2002 and oral agreement between them. On top of that the plaintiff also claimed for interest at the rate of 8%pa from 23 December 2004 until full satisfaction.

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[2] The first loan agreement is dated 30 June 2000 whereby the plaintiff on request of the first defendant, had given a friendly loan of RM100,000 to the first defendant and the first defendant had agreed to repay the said loan within 90 days from the date of the said first agreement.

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[3] The second loan agreement between the same parties is dated 5 December 2000 whereby, the plaintiff again, on request of the first defendant had given another friendly loan of RM300,000 to the first defendant. This time the first defendant had agreed to repay the said loan within six months from the date of the said second agreement. For this second loan, the second defendant had executed a personal guarantee to guarantee the due repayment of the said second loan by the first defendant as stipulated in the second agreement.

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[4] The third loan of RM28,500 was given by the plaintiff to the first defendant sometime in June 2001 on an oral request made by the first defendant, whereby the first defendant had agreed to repay the amount within three months from June 2001.

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[5] Subsequent to that the first defendant had orally requested for another loan from the plaintiff for a sum of RM40,000. This fourth loan was given by the plaintiff to the first defendant sometimes in February 2002. For this loan the first defendant promised to repay it within three months from February 2002.

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- A [6] Altogether, the total amount of friendly loan given by the plaintiff to the first defendant was RM468,500. To this effect, the same parties had entered into another agreement dated 2 February 2002 whereby the first defendant had acknowledged having taken from the plaintiff the said loan amounting to RM468,500 during the period between July 2000 and February 2002 and had agreed to pay the loan in full.

- C [7] However, the first defendant had failed to repay the said loan as agreed earlier. Relevant notices of demand were issued by the plaintiff's solicitors to the first and second defendants demanding for repayment of the said loan. Both the first and second defendants have failed to comply with the said notices of demand.

- D [8] The plaintiff filed his writ and statement of claim against both the defendants on 4 March 2005. On 31 May 2005, the plaintiff filed an application to enter judgment under O 27 r 3 of the Rules of the High Court 1980 ('RHC 1980') against the first defendant.

- E [9] After an exchange of affidavits between the parties, the learned senior assistant registrar ('SAR') allowed the plaintiff's application under O 27 r 3 of the RHC 1980 on 14 July 2006.

- F Being dissatisfied with the learned SAR's decision, the first defendant appealed to the judge in chambers. On 29 October 2007, the learned judicial commissioner dismissed the first defendant's appeal with costs. Hence the present appeal before this court.

- G [10] The first defendant (the appellant in this appeal) in his defence denied borrowing any money from the plaintiff. His contention is that the monies were for the plaintiff's investment in the first defendant's company, namely Vioceworkz Sdn Bhd and that parties were actually bound by the terms of an oral collateral agreement between them.

- H [11] The first defendant alleged that it was orally agreed in principle between them that the plaintiff would inject capital as and when required by the said company. The first defendant claimed that the various loan agreements executed by him and the plaintiff were mere façade and that the plaintiff's attempt to enforce those loan agreements by filing the suit was done in bad faith ie seeking to recover investments he has lost.

- I ORDER 27 RULE 3 OF THE RHC 1980

[12] Order 27 r 3 of the RHC 1980 deals with judgment on admission of facts. In full it reads as follows:

Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by summons.

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[13] The object of the above rule is to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed in his claim (see *Ellis v Allen* [1914] 1 Ch 904 at p 909 and *Low Yoke Lan v Ng Ooi Kiat* [2001] 4 AMR 4781).

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[14] This rule relates to admissions of fact, whether in the pleadings or otherwise. The admission must be a clear admission, and not simple evidence of some facts upon which the plaintiff would have to rely to establish his cause of action (see *Carabao Exports Pty Ltd v Online Management Consultants Sdn Bhd & Ors* [1988] 3 MLJ 271 at p 272).

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[15] The words 'or otherwise' in the said rule are of general application and justify the making of an order or judgment where an admission is made by letter or other relevant documents or agreements which clearly show that the defendant has no defence to the plaintiff's claim. They are not confined to admissions contained in the pleadings alone (see *Pembinaan KSY Sdn Bhd v Syarikat Federal Furniture Construction and Engineering Works* [1991] 1 MLJ 347 (SC)).

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[16] In *Folin & Brothers Sdn Bhd (in receivership) v Wong Foh Ling & Ors* [1991] 2 CLJ (Rep) 609, Zakaria Yatim J held:

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Under O 27 of the RHC 1980, admissions may be made in the pleadings or otherwise; the word 'or otherwise' including an admission made by letter stating facts which show the defendant has no defence to the action.

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[17] The above principle was adopted and followed in the case of *Malacca Precast Concrete Works v William Jacks & Co (M) Sdn Bhd* [1970] 2 MLJ 111; as well as in *Tom Manas Enterprise Sdn Bhd v Soh Ah Wah* [1995] 3 CLJ 610, where Low Hop Bing J (now JCA) had also ruled:

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There is no merit in the contention that O 27 only applies when an action has already commenced. There is abundant authority to support the proposition that the courts can consider and decide on the admissions made before or after legal proceedings have been commenced.

A [18] In the same case, Low Hop Bing J went on to stress that the failure to plead the admission is not fatal; and hence it is not essential that an admission, which relates to and is governed by the rules of evidence, be pleaded. This court is in total agreement with these rulings, by the learned judge.

B [19] The first defendant's defence to the plaintiff's claim is that the said monies claimed by the plaintiff were not loans or borrowings to the first defendant as alleged by the plaintiff, but were investment by the plaintiff in the company called Voiceworkz Sdn Bhd; thus the plaintiff cannot recover when the investment has lost. The first defendant did not deny receiving the monies, not as loans but as the plaintiff's investment in the said company. The first defendant submitted that the defence as pleaded does not contain any admission as otherwise alleged by the plaintiff.

D [20] The issue to be determined in this case is whether the monies were loans or borrowings given by the plaintiff to the first defendant pursuant to friendly loan arrangements as alleged by the plaintiff or whether they were investments in the company, Voiceworkz Sdn Bhd as alleged by the first defendant.

F [21] In determining the issue, the court has to consider the circumstances of the case, particularly when and how the monies were given by the plaintiff to the first defendant. Relevant documents must be considered. These documents may have been in existence before the action was commenced in court. As clearly held by Low Hop Bing J in *Tom Monies Enterprise Sdn Bhd*, there is abundant authority to support the proposition that the court can consider and decide on the admissions made before any legal proceedings have been commenced.

G [22] The first document to be considered is the 'loan agreement' dated 5 December 2000 entered into between the first defendant ('the borrower') and the plaintiff ('the lender'). These descriptions of the borrower and the lender appear expressly in the preamble to the said agreement. The relevant part of the said agreement states:

I The lender has (sic) agreed to loan a sum of RM300 000 (Ringgit Malaysia Three Hundred Thousand only) to the borrower. (Public Bank Berhad bearing cheque no 535101 dated 5 December 2000 and Public Bank Berhad bearing cheque no S12015 dated 20.6.2009. The borrower has agreed to pay back the loan within 6 (six) months from the date of this agreement.

Further down the same paragraph, the agreement provides:

This document holds good in the Courts of Law of Malaysia.

[23] The second document to be considered is another 'loan agreement' dated 2 February 2002, entered into between the plaintiff and the first defendant. This particular loan agreement was prepared and drafted personally by the first defendant. Even though the document is entitled 'loan agreement', the preamble refers the document as 'This Letter'. There is no indication to show that the said document/letter is on a 'without prejudice' basis. No such wordings appear therein. The full contents of the said document/letter are reproduced below:

This letter dated the second of February 2002 is to state that I, Vithal Kumar a/l Jayaraman bearing NRIC No. 721025-14-5645 (herein known as the borrower) residing at 166-3-7 Kiara Park Condo, Jalan Burhanuddin Helmi, Taman Tun Dr. Ismail, 60000 Kuala Lumpur have taken loans on various occasions from Encik Azman Mohd Nor bearing NRIC No. 620610-05-5007 (herein known as the lender) residing at No. 50 Jalan PJS 9/18, Bandar Sunway, 46150 Petaling Jaya, Selangor for which the details are as below:

On July	2000:	RM100,000
On December	2000:	RM200,000
On April	2001:	RM50,000
On May	2001:	RM50,000
On June	2001:	RM25,000
On June	2001:	RM3,500

On February 2002: RM40,000 (the monthly bank interest on this amount is to be serviced by the borrower until full settlement is obtained)

Total borrowings to date: RM468,500

These loans were taken to fulfill business obligation of Voiceworkz Sdn Bhd (506445-H). These loan would be returned in full in due time. These loans were given purely based on mutual trust & understanding by both parties and will be honoured in those terms.

The third relevant document to be considered is the handwritten letter dated 28 December 2004 from the first defendant personally (signed by the first defendant in his personal capacity) to the plaintiff immediately after receiving notice of demand from the plaintiff's solicitor. The said three-page handwritten letter is not marked 'without prejudice'.

[24] The relevant parts of the said letter are reproduced letter:

First and foremost I apologise for not being able to pay the money that I owe you Azman, I have the intention of paying you back and that's without doubt.

- A** Azman, I know you have been patient but please just grant me one appointment with you for me to apologise and make good my words. This time things are going ok and I will be able to make the payments to you in installments.
- Azman, I would like to pay off by the end of 2005 and work out a payment schedule whereby I will start paying you at the end of March.
- B** Azman, you have been patient with me for four years, all I ask is another three more months. If you do not have faith in my words we would draft out a lawyer's letter ...
- Azman, if I have to beg you, I will, please give one more chance and I will make good my words.
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[25] The letter ended in the following words:

- D** All I ask for is a little more time three months to be exact and I will start issuing cheques to you or your lawyers.
- Thank you.
- Yours faithfully
- (signed)
- E**
- Kumar

- F** [26] This letter is not a 'without prejudice' letter. It was written personally by the first defendant after receiving a notice of demand from the plaintiff's solicitors. It is not a letter written as part of an ongoing negotiation by the parties for settlement. Thus, this letter may be admitted as evidence to show what actually transpired between the parties in the transaction. In any event,
- G** the issue relating to admissibility of this letter was determined by the learned senior assistant registrar on 2 December 2005 where it was decided that the letter is admissible for the purpose of the application. There is no appeal filed against that decision. Therefore the decision stands.

- H** [27] After reading all the three documents, the court is more than convinced that there was a clear and unequivocal admission by the first defendant of his indebtedness to the plaintiff in respect of the claim. The contents of the letters/documents clearly show that the monies in question were loans or borrowings given by the plaintiff to the first defendant pursuant to loan agreements with clear undertaking from the first defendant to repay the amount taken within the stipulated time. The admission relates to issue of fact ie that the first defendant borrowed the amount in question from the plaintiff and thereafter has failed to repay as promised by him. The issue of
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collateral oral agreement between the parties as raised by the first defendant is baseless. The first defendant had failed to substantiate the claim to defeat the first defendant had failed to substantiate the claim to defeat the clear admission as contained in all the relevant documents.

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[28] Counsel for the first defendant before this court submitted that the said letter dated 28 December 2004 should not be admitted on the ground that the said letter was written by the first defendant without obtaining any legal advice. The court cannot accept this argument. It does not hold water. One does not require any legal advice to write such a letter, particularly so when the first defendant is highly educated, and a doctor by profession. There is no highly technical or legalistic approach in the letter. The contents are sincere expression of an innocent individual who has failed to repay loans taken from a friend and requested for more time. The contents are purely questions of fact originating from a person based on his own personal knowledge about the transaction. In short, a person need not get legal advice just to tell the truth, from his own heart.

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[29] With the admissions (based on the three documents) the court is satisfied the first defendant has no defence to the action and the plaintiff is able to obtain judgment under O 27 r 3 of the RHC 1980. The admissions alone manage to fulfil the evidential requirements for the plaintiff to establish his claim against the first defendant. Thus, judgment may be given without having to wait for the determination of any other question between the parties. Is not necessary for the action to go for full trial. All the relevant issues to establish the plaintiff's claim against the first defendant have sufficiently been proved by the said admissions, to enable the plaintiff to obtain judgment as claimed. Therefore, there is no question that the said admissions are inextricably intertwined with the issues at trial, as argued by the counsel for the first defendant.

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CONCLUSION

[30] Based on the above considerations, the court is satisfied that the judgment for the plaintiff under O 27 r 3 of the RHC 1980 granted by the learned senior assistant registrar, (which was later affirmed by the learned judicial commissioner) is right and proper. There is no justification for any interference at this stage.

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A [31] Therefore, the court unanimously dismissed the appeal with costs of RM3,000 to be paid to the respondent (plaintiff). The order of the High Court is affirmed. Deposit to the account of fixed costs.

B *Appeal dismissed with costs.*

Reported by Kanesh Sundrum

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